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In the Supreme Court of the United States

OCTOBER TERM, 1995

ROLAND J. BAILEY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

CANDISHA S. ROBINSON, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

ROY T. ENGLERT, JR.
Counsel of Record
ALAN E. UNTEREINER
LUKE P. LEVASSEUR
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

Counsel for Bailey (94-7448)

DAVID B. SMITH
Counsel of Record
English & Smith
526 King Street, Suite 213
Alexandria, VA 22314
(703) 548-8911

Counsel for Robinson (94-7492)

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REPLY BRIEF FOR THE PETITIONERS

Confronted with a statute whose language cannot plausibly be read to support his position, the Solicitor General makes a valiant effort to pretend that the "plain language" of the statute is actually helpful to his cause. But the Solicitor General's clever rhetorical device – insisting that *our* position requires the addition of words to the statute – should not be allowed to obscure the linguistic implausibility of his argument. And when it comes to the statutory structure, the legislative history, the rule of lenity, and the D.C. Circuit's two-factor test, the Solicitor General has nothing even remotely convincing to say.

I. SECTION 924(c) CRIMINALIZES ONLY THE ACTIVE EMPLOYMENT OF A FIREARM

A. The Government's Interpretation Is At Odds With The Ordinary Meaning Of The Phrase "Uses * * * A Firearm"

The government's affirmative case rests almost entirely on its claim that the "ordinary" or "natural" meaning of the phrase "uses * * * a firearm" includes possession of a firearm "for protection or security in the event that it is needed." U.S. Br. 11-14. That proposition, however, is incorrect.

1. Some hypothetical examples will quickly test the government's contention that one who places a firearm in a nightstand for protection has "used" the firearm, as has one who strategically places it in the trunk of a car or in a footlocker, even if the gun is never removed from its secure hiding place. U.S. Br. 13-14, 36.

Person *A* places a classified advertisement in a newspaper:

FOR SALE. One handgun, never used.

Person *B* responds and buys the handgun but then learns that *A* kept the gun in his nightstand. *B* sues *A* for fraud, contending that *A* lied about never having "used" the firearm, because placing the gun in the nightstand was "using" it. If the government is right about the plain meaning of "uses * * * a firearm," *B* should win. We submit, however, that *B* should not win. No ordinary speaker of the English language would believe that *A* "used" a firearm.

Person *C*, a witness in a trial, is examined as follows:

Counsel: Isn't it true that you bought a firearm in 1986?

Witness *C*: Yes.

Counsel: And did you ever use that firearm?

Witness *C*: No.

Knowing that *C* actually kept the gun in his car's trunk for protection – though he never took it out and fired it, brandished it, or traded it for drugs – the State then brings a perjury prosecution against *C*, contending that he lied when he said he never "used" the firearm. If the Solicitor General is right about the plain meaning of "uses * * * a firearm," *C* should be convicted. We submit, however, that *C* should not be convicted. No ordinary speaker of English would believe that *C* "used" a firearm. As these examples show, the government's interpretation of "uses * * * a firearm" is at odds with the ordinary meaning of that phrase.

2. The error of the government's reading is confirmed by the linguistic analysis of Section 924(c) in a forthcoming article (which has been lodged with the Clerk). See Clark Cunningham & Charles Fillmore, *Using Common Sense: A Linguistic Perspective on Judicial Interpretations of "Use a Firearm,"* 73 WASH. U.L.Q. 1159 (1995). Cunningham and Fillmore analyze the ordinary meaning of the phrase "uses * * * a firearm" by examining instances where that phrase (or its equivalent) occurs in newspaper articles and in Title 18 of the United States Code. See *id.* at 1162, 1174-1175 & n.92. They conclude that the government's interpretation is "contrary to linguistic 'common sense.'" *Id.* at 1203.[1]

Cunningham and Fillmore observe that the word "use" belongs to a class of verbs whose meaning hinges largely on context. 73 WASH. U.L.Q. at 1175-1178. Thus, the phrase "W used X"

> express[es] an idea more fully stated in the form "W used X as Y to do Z." X served an instrumental function, Y, in some purposeful activity, Z, in which X was engaged. The nature of that primary activity (Z) needs to be known before we can understand the full message of a "W uses X" utterance.

Id. at 1176. For example, the phrase "[t]hey used a rock" is "uninformative if it has no contextual support." *Ibid.* But the phrase takes on far more meaning if we learn that the context is a conversation about how several boys "kept the cabin door from blowing shut (they used a rock) [or] * * * how they dealt with the fact that there were not any picnic tables in that part of the park (they used a rock)." *Id.* at 1177. Because the verb "use" draws so much of its meaning from context, "dictionary definitions of 'use' are particularly unhelpful." *Id.* at 1178.[2]

Cunningham and Fillmore distinguish between "eventive" and "designative" meanings. An eventive meaning is one in which "a reader would understand that a specific event took place in which the gun played an instrumental role." 73 WASH. U.L.Q. at 1183. Thus, the statement "John used a gun in self-defense" is eventive because it suggests that "[u]sing the gun was a specific time-bound act." *Ibid.* By contrast, a "designative" meaning "does not bring to mind a specific event" but rather "designate[s] the firearm *to a particular purpose* * * * or * * * agent." *Id.* at 1182 (emphasis added). As an example of a "designative" usage, Cunningham and Fillmore cite an illustration relied on by both the en banc majority (J.A. 93-94) and the government (U.S. Br. 13): a gun kept in a drawer beside one's bed for fear of an intruder is "used for domestic protection." In such a designative usage, "it becomes difficult to identify an activity * * * for which the gun served an instrumental role." 73 WASH. U.L.Q. at 1181.

Cunningham and Fillmore proceed to consider "whether the * * * textual context of *use a firearm* in [Section 924(c)] makes it plausible to interpret *use* as designative." 73 WASH. U.L.Q. at 1186. For numerous reasons, this interpretation "defies semantic common sense." *Id.* at 1188. *First*, where "use" appears in a

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[1] If a statute's meaning turns on words that are to be given their "ordinary or natural meaning" (*Smith* v. *United States*, 113 S. Ct. 2050, 2054 (1993)), linguistic analysis is particularly relevant. See Cunningham & Fillmore, 73 WASH. U.L.Q. at 1173-1174. It is especially helpful, moreover, in resolving problems of "structural ambiguity" that arise in complex statutory sentences and in clarifying word meaning. Clark Cunningham et al., *Plain Meaning and Hard Cases*, 103 YALE L.J. 1561, 1569-1570 (1994) (*Plain Meaning*). This Court has taken note of linguistic analysis in deciding statutory cases. *E.g.*, *United States* v. *Granderson*, 114 S. Ct. 1259, 1267 n.10 (1994).

[2] See also *Plain Meaning*, 103 YALE L.J. at 1614-1616 (explaining limitations of dictionary definitions). The government's "plain language" argument rests almost entirely on dictionary definitions of the word "use." See U.S. Br. 12.

designative sense in Title 18, it consistently is accompanied by the word "for," which signals the designative usage. *Id.* at 1162, 1182, 1186-1187. See, *e.g.*, 18 U.S.C. § 921(a)(17)(C). In Section 924(c), by contrast, the word "for" is not employed in conjunction with the phrase "uses * * * a firearm" and no purpose is specified. *Second*, "the combination of 'uses' with 'carries' connected by 'or'" both "indicates that using a gun is a specific act" and invokes the "familiar and established" pairing of those two terms (according to which using is "more dangerous" than carrying). 73 WASH. U.L.Q. at 1187-1188 (internal quotations omitted). *Third*, "all of the appearances [in Title 18] of *use a firearm* that invite a designative interpretation are *exceptions* to legal liability, and in particular, exceptions to liability based on possession of a firearm." *Id.* at 1183 (emphasis altered). *Fourth*, in several provisions of Title 18, Congress could have employed the phrase "use a firearm" in a designative sense but instead chose "possess." See *id.* at 1183-1184.[3]

In short, a contextually sensitive "plain meaning" analysis – in contrast to the Solicitor General's one-word-at-a-time dictionary exercise – confirms that Section 924(c) is violated only if "a specific event took place in which the gun played an instrumental role." 73 WASH. U.L.Q. at 1183.

3. The government criticizes our analysis as attempting to "engraft[ ] an 'active' requirement onto the clear and unqualified statutory text" of Section 924(c). U.S. Br. 18-19. This claim lacks merit because the ordinary meaning of the phrase "uses * * * a firearm" – both in isolation and in the context of Section 924(c) – signifies the employment of the weapon during some event (the predicate offense) as an instrument to accomplish that offense. That ordinary meaning necessarily includes the idea of active employment; there is no need to add the adjective "active" to the statutory language. If anyone is asking this Court to add words to the statute, it is the government: when speakers of English wish to

[3] See, *e.g.*, 18 U.S.C. § 922(x)(3)(A)(ii)(II), 922(x)(3)(D). Cunningham and Fillmore also note that the word "during" in Section 924(c) "certainly invites an eventive interpretation." 73 WASH. U.L.Q. at 1187. And they find strong support for an "eventive" interpretation in the legislative history of Section 924(c). See *id.* at 1189-1198.

communicate the idea that a firearm is designated to serve a particular purpose such as protection, they do not say simply that the firearm "is used"; they say it is "used *for protection*."

B. Evidence In The Language And Structure Of The Statute Refutes The Government's Interpretation Of "Use"

The government's reading of the statute also cannot be reconciled with substantial evidence of a narrower meaning in the structure and language of Section 924(c) and Section 924 as a whole.

1. The government offers no explanation of what it means to "carr[y] a firearm" or how that alternative basis for liability relates to liability for "use." The government urges this Court to treat the statute's operative language as if it criminalizes "use" alone. U.S. Br. 11 n.2, 44 n.19.[4] But, for at least two reasons, the inclusion of "carr[ying]" as an alternative basis for liability refutes the government's reading of the statute.

First, under the government's definition of use liability, the alternative element of "carrying" is superfluous. Pet. Br. 16-17. Whenever a person carries a firearm during and in relation to a drug-trafficking offense, he is also possessing it in a way that "embolden[s]" him and that "provide[s] protection and security." U.S. Br. 10, 13-14. If the government's argument about "use" is correct, there was no reason for Congress to mention "carr[ying]."

The government does not dispute that its reading renders the statute's alternative element superfluous. See U.S. Br. 22-25. Instead, it asks this Court to recognize an exception to the basic principle that each word in a statute must be given effect. See *Ratzlaf* v. *United States*, 114 S. Ct. 655, 659 (1994). The government says that, before 1984, "'use' and 'carry' liability were *fundamentally different from each other and from liability under the current statute*"; that, in 1984, Congress added the phrase "during and in relation to" and combined the two subsections into one, thereby omitting the requirement that any carrying be "unlaw-

[4] Contrary to the government's suggestion (U.S. Br. 44 n.19), this Court can and should reach the issue whether petitioners' convictions can be upheld on the basis of "carrying" liability. As explained in our opening brief (at 16 & n.5), the scope of liability for carrying a firearm is clear and does not encompass the facts of either of petitioners' cases.

ful[ ]" as well as dropping "to commit" from "uses * * * to commit"; and that the "amendment divested the terms 'uses' and 'carries' of the qualifications ('to commit' and 'unlawfully during') that gave them distinct connotations." U.S. Br. 24 (emphasis added). Even if this were an accurate analysis of the legislative history (it is not, see pp. 8-9, *infra*), it would not explain why Congress retained a redundancy in this criminal statute.

Second, the word "carry" sheds significant light on the meaning of "use" because the two terms are paired in the statute as alternative bases for liability. See Pet. Br. 17-18. Such pairings can affect the meanings of the constituent words: the word "draw," for example, means something different in the phrase "draw and paint" than it does in the phrases "draw and fire" and "draw and quarter." Similarly, the word "carry" in Section 924(c) suggests a narrow meaning of "use." See Pet. Br. 18. Congress "saw 'use' as a *comparatively narrow* term, with 'carry' picking up cases of an alternative type of activity, where the defendant did not actively 'use' the weapon." J.A. 112 (dissent) (emphasis added). That "use" and "carry" bear this relationship to each other is confirmed by the legislative history of Section 924(c) (see Pet. Br. 18 n.7) and by linguistic analysis of the statute. See Cunningham & Fillmore, 73 WASH. U.L.Q. at 1187-1188, 1208-1209; Michael Geis, *The Meaning of* Meaning *in the Law*, 73 WASH. U.L.Q. 1125, 1137-1138 (forthcoming 1995) (lodged with the Clerk).

The Solicitor General, in his brief in *McLaughlin* v. *United States*, 476 U.S. 16 (1986), stated: "It appears that Congress is of the view that *something more than the carrying of the gun* is required to establish its use." U.S. Br. 19 n.18 (No. 85-5189) (emphasis added); see J.A. 114-115 (dissent). This statement strongly confirms that the Solicitor General (like the other users of English surveyed by Cunningham and Fillmore) understands the pairing "use or carry," when combined with the direct object "firearm," to express a particular kind of relationship between those verbs: "use" of a firearm means conduct that is more serious or culpable than "carrying."[5]

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[5] The government maintains that, under its interpretation of Section 924(c), "something more" is also required to establish "use" as opposed to "carrying": possession of the firearm must "facilitate commission of the predicate crime, such as by emboldening the defendant or furnishing protection to the trafficking operation." U.S. Br. 23 n.7. But every instance of carrying can also be described as one where the defendant is emboldened or is in possession of the firearm to protect the drug-trafficking venture. Thus, "something more" is *not* required to show "use" under the government's theory. And the government's argument does not explain away the government's concession in *McLaughlin* that "using" a firearm is conduct more culpable or dangerous than carrying it.

2. The government makes no attempt to explain why Congress would have had any need in 18 U.S.C. § 924(d) to specify as firearms subject to forfeiture those that are merely "involved in" certain offenses. The government does, however, attempt to explain away Congress's differentiation in Section 924(d) between firearms that are "used," and those merely "intended to be used," in certain offenses. See U.S. Br. 25-26. The government seems to contend that those two phrases were included because they refer to entirely "different classes of firearms" – those that the defendant intends to use in some future crime ("intended to be used") and those that are or were used in a past or ongoing offense ("used"). But that argument is foreclosed by *Smith*, and furthermore there is nothing in the statute to suggest that the two phrases do not also refer to two kinds of firearms that can be involved in an ongoing offense: those that are actively employed to carry out the predicate offense ("used") and those that are merely possessed for protection but never put to use ("intended to be used").[6]

3. The word "use" appears a second time in the operative sentence of Section 924(c) and conveys the unmistakable suggestion of active employment (see Pet. Br. 15): "a crime of violence or drug trafficking crime which provides for an enhanced punishment if *committed by the use of* a deadly or dangerous weapon or device." It is unlikely that Congress would have employed the word "use" in two different senses in the very same sentence. The government fails to offer a convincing response to this point.[7]

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[6] See also U.S. Br. 25 (conceding that firearms "intended to be used" reaches "future uses of firearms during the course of ongoing offenses").

[7] The government concedes that the highlighted phrase "may suggest an 'active use' requirement because the words 'committed by' may imply the use of the weapon as the means or instrumentality of committing the

C. The Legislative History Supports Our Interpretation

The government's efforts to explain away some (but not all) of the legislative history cited in our opening brief (at 22-32), and its related efforts to muster some trace of support in the legislative history for its own interpretation, are wholly unsuccessful.

1. The government's treatment of legislative history is internally inconsistent. On the one hand, the government argues that the statutory language is "plain" and that this Court may not properly consult the legislative history. U.S. Br. 27. On the other hand, the government relies heavily on the legislative history in its efforts to explain away some of the most potent evidence against it. See U.S. Br. 21-22, 24-25. In particular, the government maintains that, before the 1984 amendment, "'use' and 'carry' liability were *fundamentally different* * * * from liability under the current statute." U.S. Br. 24 (emphasis added). In 1984, the government asserts, Congress caused the two bases for liability to converge by removing the "qualifications ('to commit' and 'unlawfully during') that gave them distinct connotations." U.S. Br. 24.

The claim that Congress expanded the meaning of "use" liability in or after 1984 is critical to the government's argument because, before 1984, "use" liability could not possibly have meant what the government says it now means. At that time, the statute included the phrase "uses *to commit*," which the government does not claim is capable of accommodating the interpretation urged on this Court. See U.S. Br. 21, 24-25, 29-30, 33; note 7, *supra*. In addition, the government's construction would have rendered superfluous the word "unlawfully" (which before 1984 qualified "carry" liability), and thus violated the principle that every word in a statute must be given effect. Cunningham & Fillmore,

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offense" but maintains that the pertinent phrase "is not a reliable guide" for determining the meaning of "uses * * * a firearm" because the phrase originally was "intended to refer" to a handful of penalty enhancement provisions in specific statutes, and thus "was not intended to * * * track the basic prohibition of Section 924(c)." U.S. Br. 21-22. In the absence of any showing that the provision tracks the language of the penalty provisions to which the government refers, its argument provides no basis to depart from the usual assumption that, when Congress uses the same word twice in the same sentence, it intends the same meaning.

73 WASH. U.L.Q. at 1191-1192. Acceptance of the government's interpretation thus depends on a showing that Congress expanded "use" liability in 1984 or thereafter.

The government does not suggest that Congress expanded the meaning of "use" liability in 1986 or 1988; it focuses instead on the 1984 amendment. The threshold difficulty with that argument is that only *in 1988* did Congress include among Section 924(c)'s predicate offenses passive drug offenses, in which (according to the government) "the typical use of a firearm is [to] provide security for the operation." U.S. Br. 36; see also *id.* at 20. Even more damaging to the government's theory is the fact that in 1984 Congress *narrowed* the category of predicate offenses from all federal felonies (including *drug-trafficking felonies*) to "crime[s] of violence." See Pet. Br. 25; U.S. Br. 29, 31. Thus, at the same time that the government says Congress was "fundamentally" expanding the concept of "use" beyond active employments of the firearm as an instrumentality of the predicate offense, Congress was narrowing the predicate offenses to a kind – crimes of violence – in which (the government elsewhere concedes) "[a]s a general matter * * * guns are used * * * as instrumentalities of the offense." U.S. Br. 20. This scenario is implausible, to say the least. If Congress meant to expand "use" to cover the possession of a firearm for protection during a predicate offense, why would it have narrowed the statute so that only possessions occurring during "crimes of violence" (but not during non-violent federal felonies) were subject to criminal penalties?[8]

2. Apart from its untenable theory of "fundamental[ ]" change to "use" liability in 1984, the government offers *only one* piece of evidence from the legislative history in support of its proposed in-

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[8] Nothing in the legislative history remotely suggests that Congress meant to expand the meaning of "use" in 1984. See Pet. Br. 25-27 & n.15; J.A. 111 (dissent). The Senate Report comments on a variety of other changes to the statute brought about by the 1984 amendment – several of which would have been far less significant than the "fundamental[ ]" change to "use" liability claimed by the government. See Pet. Br. 25-27. In addition, Congress's removal of the phrase "to commit" in 1984 was necessary to avoid an ungrammatical construction. See Cunningham & Fillmore, 73 WASH. U.L.Q. at 1195-1196.

terpretation of "uses * * * a firearm" in Section 924(c). It quotes a remark made in 1968 by Representative Poff, who, according to the government, announced in introducing his amendment that its purpose was "'to persuade the man who is tempted to commit a Federal felony to leave his gun at home.'" U.S. Br. 27 (quoting 114 Cong. Rec. 22,231 (1968)). The government maintains that this statement "strongly suggests that the 'uses' prong was intended to reach anyone who commits a federal felony and does not 'leave his gun at home.'" U.S. Br. 28.

A more selective use of legislative history is difficult to imagine. This snippet lifted from the floor debate is *not* a declaration of the Poff amendment's purpose. Rather, it is a statement about the general deterrent effect Poff thought his measure would have on those who, in the absence of the measure, would "carry" their firearms during an underlying offense (a statement made, moreover, in response to the anticipated criticism that mandatory sentences can be counterproductive). See 114 Cong. Rec. 22,231 (1968). Nor can the government be serious in suggesting that Section 924(c) reaches every case where the perpetrator of a drug-trafficking offense or crime of violence merely fails to "leave his gun at home." U.S. Br. 28. That interpretation would criminalize simple possession of a firearm "during and in relation to" a drug-trafficking offense, and would in some cases read the latter elements out of the statute entirely. In any event, the government's interpretation of Representative Poff's comment is at odds with its claim that "use" liability before 1984 was "*fundamentally different* * * * from liability under the current statute." U.S. Br. 24 (emphasis added).[9]

3. The government also argues that the "construction of the 1984 amendments" must be "informed by the principle that when

[9] The government suggests (U.S. Br. 28-29 & n.9) that only the statements of Representative Poff are relevant to understanding the meaning of the statute as enacted in 1968, yet in previous cases the Solicitor General has relied on the statements of other legislators to discern the statute's meaning. See, *e.g.*, U.S. Br. 19-21, *Deal* v. *United States*, 113 S. Ct. 1993 (No. 91-8199) (relying on statements of numerous Members regarding the Poff and Casey amendments); U.S. Br. 26-36, *Busic* v. *United States*, 446 U.S. 398 (1980) (Nos. 78-6020 and 78-6029) (same).

Congress reenacts legislation that has been subject to a 'settled judicial construction,' the courts 'will apply the presumption that Congress was aware of these earlier judicial interpretations and, in effect, adopted them.'" U.S. Br. 32 (quoting *Keene Corp.* v. *United States*, 113 S. Ct. 2035, 2043 (1993)). According to the government, by 1984 "the term 'uses' in Section 924(c) had been uniformly construed to embrace any employment of a firearm to facilitate the commission of a federal felony, including the sorts of uses for protection that are at issue in this case." U.S. Br. 32.

That argument is inconsistent with the government's claim (U.S. Br. 24) that Congress "fundamentally" altered the nature of "use" liability in 1984. Furthermore, the premise of the government's argument is mistaken. In keeping with the ordinary understanding that carrying a firearm describes a broader (and less serious) class of conduct than using a firearm, the great majority of the approximately 270 reported cases between 1968 and 1984 were decided under the "carrying" prong. Of the cases involving firearm "use," moreover, virtually all were cases in which the firearm was actively employed to carry out the predicate offense.[10] Far from establishing the "uniform construc[tion]" the government claims, the three pre-1984 decisions of the Second and Ninth Circuits cited by the government (see U.S. Br. 32-33) are anomalies, perhaps influenced by unusual facts. Nor does anything in the legislative history support the reenactment theory.

Finally, the government's argument for congressional acceptance in 1984 of broad judicial construction of Section 924(c) should be rejected because Congress, since 1988, has repeatedly attempted to amend Section 924(c) so that it would cover precisely the kind of conduct that the government claims it *already* cov-

[10] See, *e.g.*, *United States* v. *Chilcote*, 724 F.2d 1498, 1500-1501 (11th Cir.) (brandished), cert. denied, 467 U.S. 1218 (1984); *United States* v. *Burns*, 701 F.2d 840, 841 (9th Cir.) (same), cert. denied, 462 U.S. 1137 (1983); *United States* v. *Shaw*, 701 F.2d 367, 375 (5th Cir. 1983) (fired), cert. denied, 465 U.S. 1067 (1984); *United States* v. *Sheppard*, 569 F.2d 114, 115 (D.C. Cir. 1978) (brandished); *United States* v. *Reid*, 517 F.2d 953, 955 (2d Cir. 1975) (fired); *United States* v. *West*, 486 F.2d 468, 469 (6th Cir. 1973) (same), cert. denied, 416 U.S. 955 (1974).

ers.[11] A 1989 bill, for example, was aimed at "broaden[ing]" Section 924(c) "to reach persons who have a firearm * * * available during the commission of certain crimes, even if the firearm is not carried or used," as where "a loaded firearm [i]s found in the dresser drawer of an apartment which the defendant utilize[s] in connection with his drug dealings." 135 Cong. Rec. 13,079 (1989) (section-by-section analysis of S. 1225); *ibid.* (amended statute would be expanded to cover firearm possessed by defendant "*for potential employment* in his illegal activities") (emphasis added). This evidence refutes the government's strained argument about congressional acquiescence.

4. The government fares no better in its efforts to explain away abundant evidence (see Pet. Br. 22-32) from the legislative history that supports our position. Senate Report No. 225 includes the following statement: "[T]he requirement that the firearm's *use or possession* be 'in relation to' the crime would preclude its application in a situation where its presence played no part in the crime, such *as a gun carried in a pocket and never displayed or referred to* in the course of a pugilistic barroom fight." S. Rep. No. 225, 98th Cong., 2d Sess. 314 n.10 (1983) (emphasis added), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3492 n.10.; see Pet. Br. 27-28. If the scenario described is insufficient to trigger liability for either use or carrying, then possession short of carrying (for the purpose of protection or to embolden the defendant) could not possibly give rise to use liability. See Pet. Br. 28.[12]

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[11] See, *e.g.*, S. 1225, 101st Cong., 1st Sess. § 113 (1989) (proposing to replace "uses or carries a firearm" with "uses, carries, or *otherwise possesses* a firearm") (emphasis added); S. 1356, 103d Cong., 1st Sess. § 1007 (1993) (same); S. 2305, 102d Cong., 2d Sess. § 401 (1992) (proposing to replace "uses or carries" with "knowingly uses, carries, or otherwise possesses"). See generally Cunningham & Fillmore, 73 WASH. U.L.Q. at 1198-1203 (describing and analyzing Congress's post-1988 efforts to expand statute to cover possession of firearm).

[12] The passage also contains the following statement: "Evidence that the defendant had a gun in his pocket but did not display it, or refer to it, could *nevertheless* support a conviction for 'carrying' a firearm in relation to the crime if from the circumstances or otherwise it could be found that the defendant intended to use the gun if a contingency arose or to make his escape." S. Rep. No. 225, at 314 n.10 (emphasis added), *reprinted in* 1984 U.S.C.C.A.N. at 3492 n.10. The government claims (U.S. Br. 30-31) that this statement has nothing to do with "use" liability and relates only to "carry" liability. That reading is untenable. It fails to account for the word "nevertheless," which suggests a contrast to the preceding sentence. Because the preceding sentence includes an example of "use" liability, the sentence in question necessarily describes a scenario that would not qualify for "use" liability.

Equally unavailing is the government's attempt to explain away an example in House Report No. 495 relating to drug traffickers. Compare Pet. Br. 30-31 with U.S. Br. 34-35. The government simply ignores the example, which demonstrates that Congress understood that "carry" rather than "use" liability would attach to a drug dealer who "carried [a firearm] *for protection*." H.R. Rep. No. 495, at 10 (emphasis added), 1986 U.S.C.C.A.N. at 1336. The government instead focuses on the sentence that precedes the drug trafficker example, in which the Committee contrasts carrying a firearm with "actually us[ing]" it. *Ibid.* (emphasis omitted). The government states that in this instance the phrase "actually uses" means "the firing or discharge of the weapon" (U.S. Br. 35) but fails to explain why the word "actually" narrows the meaning here but not elsewhere. See U.S. Br. 28-29 & n.9 (arguing that "actual use" of firearm includes possession to protect drugs and that reference to "actual use" does not support our position).[13]

D. The "Active Employment" Interpretation Is Not Foreclosed By *Smith* Or The Government's Policy Arguments

1. According to the Solicitor General, "it follows *a fortiori*" from this Court's decision in *Smith* v. *United States*, *supra*, "that when a defendant places a gun near drugs or proceeds to provide security for the commission of a drug trafficking crime, he has

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[13] The government invokes a supposed "broad expression of purpose" behind the 1986 amendment on the part of the House Judiciary Committee. U.S. Br. 34. The language quoted, however, comes from sections of the House Report that describe either testimony heard by a subcommittee or anticipated benefits for law enforcement personnel. The report describes the legislation's "purpose" in a manner that does not aid the government. H.R. Rep. No. 495, at 1, 1986 U.S.C.C.A.N. at 1327.

'used' the gun within the meaning of the statute." U.S. Br. 14-15. The argument is based on a misreading of *Smith*.[14]

The government fails to recognize that "the interpretive issue in *Smith* is linguistically quite different from that presented" here. Cunningham & Fillmore, 73 WASH. U.L.Q. at 1173; see also *id.* at 1181. There, the Court was called on to decide whether Section 924(c) reaches only those cases where a firearm is "used as a weapon" or also cases where the firearm's instrumental role is more unusual – such as where a firearm is used as an item of barter. To return to an example employed above, if the phrase "W used X" is given its expanded form "W used X *as Y* to do Z," the Court was called on to interpret the highlighted unexpressed phrase. Thus, the issue in *Smith* was whether Section 924(c) punishes not only those *active employments* of a firearm to carry out a predicate offense in which the firearm is used as a weapon, but also *active employments* where the instrumental role is more unusual. Here, by contrast, the Court must determine whether Section 924(c) reaches *passive* relationships between the firearm and the predicate offense (relationships that cannot easily be described by the phrase "W used X as Y to do Z"). Accord J.A. 115-116 (dissent).[15]

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[14] In its discussion of *Smith*, the government incorrectly suggests (U.S. Br. 15-16) that our "active employment" interpretation was rejected by the D.C. Circuit in *United States* v. *Long*, 905 F.2d 1572, 1576-1577 (Thomas, J.), cert. denied, 498 U.S. 948 (1990). The court of appeals in *Long reversed* a Section 924(c) conviction on the ground that there was insufficient evidence to show that the firearm in question had been "used" and explicitly stated (905 F.2d at 1578-1579) that it was basing it decision not on an interpretation of "use" but rather on the ground that possession was a precondition to use and there was insufficient evidence of possession. Thus, the *Long* court's statement that "offenders can 'use' guns simply by possessing them in the vicinity of drugs" (*id.* at 1576) can hardly be viewed as a holding. Moreover, the *Long* court's dictum, read in context, is nothing more than a descriptive statement of how other courts had given the word "use" a broad interpretation. Compare *id.* at 1576 (rejecting government's claim that "loose, transitive relationship" between firearm and predicate offense could give rise to "use" liability).

[15] The government also ignores this Court's reasons in *Smith* for deciding that the statute reaches beyond instances where a firearm is used in its ordinary or typical instrumental role. The decision turned in part on the language of Section 924(d)(1), which authorizes the forfeiture of firearms and ammunition that are "involved in or used in" certain offenses and "intended to be used" in other offenses. 18 U.S.C. § 924(d)(1); see also *id.* § 924(d)(2)(C) (same). Because some of the enumerated offenses include use of a weapon as an item of barter, the Court reasoned, Congress must have intended the word "use" to include trading a weapon for drugs. 113 S. Ct. at 2056-2057. Here, by contrast, there is not the slightest indication in Section 924(d) that Congress envisioned as "use" passive relationships.

2. The government also claims that, if our interpretation of "use" were accepted, Section 924(c) would become "virtually a dead letter in the context of many of the drug trafficking crimes to which it expressly applies." U.S. Br. 20; *id.* at 43 (stating that our interpretation would "effectively undo 1988 amendment"). In possessory drug offenses, the government argues, firearms "ordinarily" are not actively employed to carry out the offense but rather are merely possessed for protection. U.S. Br. 21. In addition to being at odds with empirical data in the government's brief (see U.S. Br. 40 n.15 (citing study purportedly finding that 83% of drug dealers "had fired a gun at someone")), the argument is significantly overdrawn. A firearm obviously *can* be actively employed in the commission of a possessory offense, as for example where a defendant fires, brandishes, or displays a firearm to ward off the police or those seeking to steal the drugs or drug proceeds.

E. The Rule Of Lenity Supports Our Interpretation

Even if the Court concludes that the plain language, structure, and legislative history of Section 924(c) do not compel the active employment requirement, there can be little doubt, in light of the analysis above, in our opening brief, and in academic commentary on Section 924(c), that our interpretation is a reasonable one, and that the statute is *at least* ambiguous. "[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis* v. *United States*, 401 U.S. 808, 812 (1971).

The government argues that the rule of lenity does not apply because "common usage" clearly embraces its broad interpretation that "uses * * * a firearm" means "any employment of a firearm

that facilitates a drug trafficking offense." U.S. Br. 37. As we demonstrate above, however, that claim is mistaken. Moreover, the government concedes that, in determining whether a statute is ambiguous, a party must "'seiz[e] every thing from which aid can be derived.'" U.S. Br. 37 (quoting *United States* v. *Bass*, 404 U.S. 336, 347 (1971)). The government violates that rule, however, when it ignores much of the evidence of the language, structure, and legislative history set out in our opening brief. The government also argues that the rule of lenity does not apply merely because it is "*possible* to articulate" an alternative construction. U.S. Br. 37. But, if anything, it is the government's interpretation that represents merely a "possible * * * articulat[ion]" of the statute's meaning – albeit one in tension with the ordinary meaning of the statute's operative language, lacking other support in the text, structure, and history of Section 924(c), and dependent on the unwarranted premise that Congress "fundamentally" changed the scope of use liability in 1984.[16] Because the "text, structure, and history" of Section 924(c) "fail to establish that the Government's position is unambiguously correct," the rule of lenity applies fully to this case. *United States* v. *Granderson*, 114 S. Ct. 1259, 1267 (1994).

F. The Evidence Was Insufficient To Show Active Employment Of A Firearm To Carry Out The Predicate Offenses

Perhaps recognizing that "the ordinary meaning" of the phrase "uses * * * a firearm" "connote[s] activity beyond simple possession," *United States* v. *McFadden*, 13 F.3d 463, 467 (1st Cir. 1994) (Breyer, C.J., dissenting), and that many courts of appeals have held that "use" must mean something more than possession (Pet. Br. 36-38; J.A. 82), the government struggles throughout its brief to conjure up some trace of activity on the part of petitioners

[16] Equally incorrect is the government's attempt to invoke Congress's assertedly broad purpose behind Section 924(c) in arguing that the scope of "use" liability is unambiguous. See *Hughey* v. *United States*, 495 U.S. 411, 422 (1990) (rule of lenity precludes resolution of ambiguities against criminal defendants "on the basis of general declarations of policy in the statute"). And the government overstates significantly the breadth of Congress's purpose. See Pet. Br. 22, 25-26, 29, 32; pp. 10, 13 n.13, *supra*.

with respect to the firearms. Toward that end, the government repeatedly refers to defendants who "place" a firearm in proximity to drugs or drug proceeds, and maintains that the "placement of a weapon in such a way as to protect drugs and drug proceeds is a 'use' of the weapon." U.S. Br. 10. The government even says that petitioners Bailey and Robinson "*deliberately* and 'actively' place[d] a firearm proximate to drugs." U.S. Br. 19 (emphasis added). This claim is problematic in several respects.

First, there was no evidence that Bailey or Robinson "deliberately * * * placed" the handguns involved in their respective cases in the locations where the police found them. In Robinson's case, moreover, the undisputed evidence strongly suggested that Kwarme Parker, not Candisha Robinson, placed the firearm in the locked trunk (to which Parker alone had the key). See Pet. Br. 5-6. Even if the jury could have inferred that petitioner Bailey had placed the firearm in the trunk of his car, there was no basis on which the jury could have concluded that such placement occurred *during* the predicate offense of possession with intent to distribute.[17]

[17] The government misstates the record in several other respects. The government asserts that the $20 in marked money recovered in the search of Candisha Robinson's apartment on July 16, 1991, was the money that had been handed to *Veloria* Robinson, petitioner's sister, by undercover officer Hale "on the previous day" (U.S. Br. 5); in fact, the money came from Hale's purchase on July 16 from Kwarme Parker (during which Candisha Robinson was not present). See 10/30/91 Tr. 28, 134. The government states that on July 16, as Hale was approaching the apartment, Parker met him and said that Parker lived in the apartment with petitioner *Candisha* Robinson (U.S. Br. 5); in fact, Parker told Hale that "*Veloria* was inside the apartment, but that he also lived in the apartment and could serve him." J.A. 48 (emphasis added). The government also states incorrectly that the *Robinson* jury could have "infer[red] from the location of the pistol * * * that [it] provided protection and security in her *distribution of cocaine*." U.S. Br. 44 (emphasis added). Yet Robinson was not charged with distribution on July 16, the date relevant to the Section 924(c) count. See Pet. Br. 5-6 & n.2, 49. She was charged with (and convicted of) using or carrying a firearm on July 16 during the predicate offense of possession with intent to distribute. As for the record in *Bailey*, the government incorrectly maintains that Bailey "was arrested in a car that served as a mobile

Second, a rule of liability that hinges on evidence that the defendant "placed" the firearm near the drugs or drug proceeds would lead to absurd results. If "placement" is a necessary element of the "use" offense when the government relies on a "possession-for-protection" theory, the government would have to show that the act of placing the firearm also occurred *during* the predicate offense. Under that reading, the statute's stiff mandatory sentences would apply to a defendant who possessed a firearm for protection during a distribution offense if the defendant "placed" the weapon in its location while the distribution was occurring, but not if the placement occurred before the distribution began. See also Cunningham & Fillmore, 73 WASH. U.L.Q. at 1181 ("Even if the initial act of placing the gun in the drawer is viewed as an event, that is an act done *to* the gun, not *by means of* the gun.").

Once the government's factually and legally untenable "placement" gloss is rejected, its argument boils down to a request that this Court rule that the mere possession of a firearm during a drug trafficking offense qualifies as a "use." But possession alone cannot be enough to constitute "use." See Pet. Br. 36-38.

II. WHETHER A FIREARM WAS "USED" SHOULD, AT A MINIMUM, BE ASSESSED IN LIGHT OF ALL RELEVANT FACTORS

In our opening brief, we argued that, if the Court does not accept the definition of firearm "use" set forth above, then it should endorse a test that takes into account all of the factors that are relevant to distinguishing between mere possession (which the statute does not reach) and use. Pet. Br. 35-50. We urged the Court to provide guidance by expressly recognizing several clear limits on the concept of "use" that are apparent from the statutory language, structure, and legislative history but have been misunderstood by some of the lower courts (including the court below). Pet. Br. 36-44. Finally, we asked the Court to recognize a variety of factors that are relevant to determining liability and explained

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operation for the distribution of cocaine." U.S. Br. 44. There was no evidence that Bailey had ever distributed cocaine out of his car. Indeed, the government *conceded* before the D.C. Circuit (En Banc Tr. 57) that the evidence in *Bailey* was *legally insufficient to sustain a conviction for distribution*.

why, when the evidence is evaluated in light of those factors, petitioners' convictions cannot be sustained. Pet. Br. 44-50.

The government largely ignores the limiting principles proposed in our opening brief. As for the factors we identified as relevant to determining whether a firearm was "used" (as opposed to merely possessed), the government agrees that each describes evidence that "may in some cases have probative value * * * in considering whether to infer 'use' under Section 924(c)." U.S. Br. 42.[18] The government contends, however, that a reviewing court need not examine the evidence presented under all of the factors because no single factor is necessary in order to prove "use." U.S. Br. 42. The government adds that, in some unspecified category of cases, it may not be necessary for the government even to prove the two factors identified by the D.C. Circuit; proof of some of the other factors we identified might suffice to show "use." U.S. Br. 42. Finally, the government concedes that even proof of the D.C. Circuit's two factors "does not *invariably* mean that the gun was 'used' in relation to the drug trafficking offense." U.S. Br. 41. The countervailing evidence, however, is to be assessed only by the jury (and not by a reviewing court). U.S. Br. 41.

The government's position assuredly will not bring greater clarity to this area of the law. More important, the government's suggested approach departs from the principles governing review for sufficiency of the evidence. Such review preserves "the factfinder's role as weigher of the evidence" and "gives full play to the [factfinder's] responsibility * * * to resolve conflicts in the testimony * * * and to draw reasonable inferences from basic facts to ultimate facts" by providing "that upon judicial review *all of the*

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[18] The government treats the D.C. Circuit's "accessibility" factor (J.A. 80, 101) and our accessibility factor as equivalent, but they are not. See U.S. Br. 42. The D.C. Circuit's test examines the weapon's accessibility from the location where the drugs, drug proceeds, or drug paraphernalia are found, whereas the more relevant consideration is whether the weapon is accessible *to the defendant* from the place where *the defendant is located* "during" the predicate offense. The government also suggests, incorrectly, that the firearms at issue in these cases were kept "within reach" of the defendant. U.S. Br. 25 n.8.

evidence is to be considered in the light most favorable to the prosecution." *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979). The government cites no authority for the proposition that a reviewing court should assess only a portion of the concededly relevant evidence in conducting sufficiency review.[19]

Finally, the government has ignored another point raised in our opening brief (Pet. Br. 11, 17 & n.6, 38 & n.21). If petitioners' conduct had not been the subject of a separate charge under 18 U.S.C. § 924(c), it could have been punished under the Sentencing Guidelines through an upward adjustment. In this case, therefore, the Court ultimately is called on not to decide what conduct will go unpunished but rather to define the boundary between two sentencing regimes (one calling for rigid mandatory minimum penalties, the other for more carefully calibrated punishment). *McFadden*, 13 F.3d at 467-468 (Breyer, C.J., dissenting). There is accordingly no good reason rooted in federal sentencing policy for the Court to endorse the government's strained construction.

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[19] In any event, the government's approach will not assure that only convictions based on sufficient evidence of "use" will be obtained. Suppose, for example, that the trunk of Bailey's car had been empty, but that, on searching his apartment several miles away, the police had uncovered a turn-of-the-century target pistol that was in a drawer in Bailey's bedroom next to the cash proceeds of drug trafficking. Suppose as well that the pistol was inoperable, was unloaded, and belonged to Bailey's gun-collector roommate (who testified that he, not Bailey, placed it in the drawer); that there was no proof of a prior drug transaction (only Bailey's possession of drugs in his car); and that an expert testified that persons involved in drug trafficking typically use automatic weapons and never use old target pistols. Under the government's theory, the jury could, on the basis of this evidence, lawfully convict Bailey of "using" the pistol "during and in relation to" the predicate offense of possession of cocaine with intent to distribute it, and an appellate court would be powerless to order reversal.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

ROY T. ENGLERT, JR.
Counsel of Record
ALAN E. UNTEREINER
LUKE P. LEVASSEUR
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

Counsel for Bailey (94-7448)

DAVID B. SMITH
Counsel of Record
English & Smith
526 King Street, Suite 213
Alexandria, VA 22314
(703) 548-8911

Counsel for Robinson (94-7492)

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